Case No. OP 10-268

IN THE SUPREME COURT OF THE
STATE OF MONTANA

JOHN E. LEWTON, Defendant/Petitioner,

vs.

THE MONTANA TWELFTH JUDICIAL DISTRICT COURT, CHOUTEAU COUNTY, AND THE HONORABLE DAVID G. RICE, PRESIDING JUDGE, Respondent.

Application for
Writ of Supervisory Control

APPEARANCES:

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The Honorable David G. Rice
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I. APPLICATION FOR WRIT OF SUPERVISORY CONTROL

Defendant/Petitioner, John E. Lewton ("Lewton") petitions the Montana Supreme Court pursuant to M.R.App.14, to issue a Writ of Supervisory Control on an emergency basis, staying the jury trial currently scheduled for June 28, 2010, in State of Montana v. John E. Lewton, Chouteau County District Court Cause No. DC-09-13, and immediately reverse the Order on Motion to Dismiss of District Judge David G. Rice, Twelfth Judicial District Court entered on June 3, 2010:

(1) June 3, 2010 Order on Motion to Dismiss:

The district court denied Lewton's motion to dismiss the prosecution of the Chouteau County case with prejudice that he filed on April 14, 2010, on the grounds that it violated Lewton's Constitutional and statutory right to be free from double jeopardy. The district court held that Lewton could not have been charged with the Chouteau County offenses in the Jefferson County case and conversely he could not have been charged with the offense that he was acquitted in Jefferson County in the Chouteau County prosecution. Therefore, the State of Montana could not have charged Lewton with all of the charges in either county because the transactions were not the same. See. Order on Motion to Dismiss, attached hereto as Exhibit 1.

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II. PARTICULAR LEGAL ISSUES

1. Is a Writ of Supervisory Control appropriate in this instance?

2. Did the District Court err in denying Lewton's motion to dismiss the Chouteau County prosecution based upon Lewton's right to be free from Constitutional and statutory double jeopardy?

III. SUMMARY OF ARGUMENTS AND AUTHORITIES.

A. SUMMARY OF RELEVANT FACTS.

The following factual allegations where taken from the Information and Supporting Affidavit filed in State of Montana v. John E. Lewton, Chouteau County District Court Cause No. DC-09-13(attached hereto as Exhibit 2) and the Information and Supporting Affidavit filed in State of Montana v. John E. Lewton, Jefferson County District Court Cause No. DC-09-26 (attached hereto as Exhibit 3).

The Montana Department of Fish, Wildlife & Parks (FWP) started a criminal investigation of Lewton in 2005 related to bighorn sheep hunting in Montana. The investigation revealed that Lewton, a licensed taxidermist, was with a number of bighorn sheep tag holders in Montana during the last 10 to 15 years when the tag holders were hunting for bighorn sheep.

On July 29, 2008, FWP undercover warden, Justin Gibson ("Gibson") posing as "Justin Allen" a new resident to Montana, went to Lewton's taxidermy shop in Whitehall, Jefferson County, Montana, and told Lewton that he had drawn a bighorn sheep tag in hunting district 680 for the 2008 hunting season. See, 2008 Resident Bighorn Sheep License #487, issued to "Justin Allen" a/k/a Gibson, attached hereto as Exhibit 4. Hunting district 680 includes both Blaine County and Chouteau County. Lewton discussed with Gibson how to hunt for bighorn sheep and how to find the biggest rams and how to score them in the field. Lewton encouraged Gibson to scout district 680 prior to the hunting season and to also spend some money to pay a pilot to scout the area by airplane.

On August 27, 2008, Gibson again returned to Lewton's shop in Whitehall and made plans to have Lewton scout the area from an airplane prior to the opening of the hunting season. Gibson gave Lewton a check in the amount of $1,000.00 to pay the pilot for flying hunting district 680. Gibson also made plans to meet Lewton in hunting district 680 at the start of the 2008 hunting season on September 15, 2008. On September 14, Lewton called Gibson from Stafford Ferry, located in Fergus County, north of Winifred, Montana, and told him to come to the Missouri breaks, which is part of hunting district 680, because Lewton had found a trophy bighorn ram in the area for Gibson to hunt. Gibson told Lewton that he could not

get there until September 17. In the afternoon of September 17, 2008, Gibson and another FWP undercover warden, C.R., met up with Lewton on the south side of the Missouri River at Stafford Ferry in Fergus County. Blake Trangmoe ("Trangmoe") a friend of Lewton's was also there. Lewton directed Gibson and C.R. to followed he and Trangmoe in separate trucks across the Missouri River on the ferry to Blaine County. They then drove to an area in hunting district 680 and unloaded their "quads" or ATVs from their trucks. From there the four drove separate ATVs south along a road that crossed the private property of Charles Tordick, located in Blaine County. They then crossed into Chouteau County and parked their ATVs off of the road on Bureau of Land Management ("BLM") property. Lewton then led them on foot further south a few miles to a location overlooking Birch Creek where they met up with James Reed ("Reed"), a friend of Lewton's who had been watching a group of bighorn rams for the last 3 days.

According to Gibson, Reed, Lewton and Trangmoe directed Gibson and C.R. where to go to find the "target" ram that they were looking for Gibson to shoot. Over the course of the next day and a half, according to Gibson, Reed and Lewton communicated by two-way radio about the location of the target ram and he best way to approach it. The radio guidance from Reed continued and Lewton and Trangmoe led Gibson and C.R. close enough to the ram for Gibson to shoot at it on

two separate occasions. Gibson missed the ram with his rifle on purpose both times he shot at it. Lewton and Trangmoe and C.R. were videotaping portions of the hunt. The group set out again and in the afternoon of September 18, they found the ram again, according to Gibson, with the radio guidance of Reed and Gibson finally shot and killed the ram on BLM property located in Chouteau County. All five members of the hunting party posed for photographs with the ram. Lewton and Trangmoe caped the ram and quartered it, and according to Gibson, all five members of the hunting, party, Gibson, C.R., Lewton, Trangmoe and Reed, transported the ram to C.R.'s ATV, which was parked on the private property of Catherine Brewer, and it was placed in his cooler which was tied to the back of his ATV. Gibson validated his tag and attached it the ram. See, Tag, attached hereto as Exhibit 5.

The paths of Lewton, Trangmoe, Reed, Gibson and C.R. were tracked with a global positioning unit by C.R. during the hunts on September 17 and 18, 2008. According to Gibson that information as well as information regarding land ownership, revealed that Lewton led them across private property and public property, on foot as well as on there ATVs. Interviews with George Laulo, Catherine Brewer, and William Brown revealed that they own real property on to

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which the hunting party went, but none had given permission for the party to hunt on their real property.

The hunting party then returned to the two trucks on their ATVs and Gibson and C.R. left with the ram in there possession to have it "plugged" by FWP, which is required by FWP regulations. Lewton and Reed returned to Whitehall. On September 19, Lewton contacted Gibson by telephone, who at the time was in Helena, in Lewis and Clark County, and asked him about his contact with FWP regarding the plugging of the ram. Plans were then made for Gibson to bring the plugged ram to Lewton's taxidermy shop in Whitehall that afternoon. Gibson brought the ram to Lewton's shop, where Lewton removed the remainder of the hide from the head of the ram and he and Reed measured the horns. Gibson alleges that Lewton then offered to buy the head and horns from him. Pictures were taken of the head and horns and then Gibson left Lewton's shop and returned to Helena with the ram.

According to Gibson on October 7, Gibson contacted Lewton by telephone from Helena, and Lewton offered to buy the head and horns for $5,000.00 plus provide Gibson with a "cast" of the horns.

On that same day Gibson drove from Helena with the head and horns to Lewton's shop in Whitehall, where he sold them to Lewton for $5,000.00. Lewton

wrote Gibson a check for $5,000.00 and at Lewton's request, Gibson wrote Lewton a bill of sale for the head and horns of the ram. See, check for $5,000.00 made payable to "Justin Allen" attached hereto as Exhibit 6; and also See, the bill of sale attached hereto as Exhibit 7.

Moments after the sale was completed FWP agents served a search warrant on Lewton at his shop in Whitehall and searched and seized various items of evidence from Lewton, including the head and horns of the ram, the bill of sale for the ram, photographs, a radio, a GPS unit, a video camera and tripod, Lewton's computers and financial records.

B. PROCEDURAL BACKGROUND.

Pursuant to MCA 87-1-105, the attorney general of the state is the legal adviser of FWP and shall, together with the several county attorneys, enforce the provisions of tile 87 of the Montana Code Annotated.

On August 24, 2009, in Chouteau County District Court, based upon the foregoing allegations, Lewton was charged by Information by the Montana Attorney General's office with Count 1: Hunting Without Landowner Permission, a misdemeanor, as specified in Mont. Code Ann. Sec. 87-3-304: On or about September 17, 2008, the Defendant hunted on the private property of George Laulo, Catherine Brewer, and/or William Brown without permission of the

landowner, lessee, or their agent; Count 2: Hunting Without Landowner Permission, a misdemeanor, as specified in Mont. Code Ann. Sec. 87-3-304: On or about September 18, 2008, the Defendant hunted on the private property of George Laulo, and/or Catherine Brewer without permission of the landowner, lessee, or their agent; Count 3: Unlawful Possession of Game Animal, a felony, as specified in Mont. Code Ann. Sec. 87-3-111: On or about September 18, 2008, the Defendant purposely or knowingly, possessed or transported all or part of an unlawfully killed or taken game animal, to-wit: a bighorn sheep. The animal was killed and/or transported in violation of Mont. Code Ann. Sec. 87-1-125 (Montana Fish, Wildlife and Parks Commission regulations prohibiting two-way communication while hunting and/or prohibiting the use of motor vehicle off legal routes on public land), Mont. Code Ann. Sec. 87-3-304 prohibiting hunting on private land without landowner permission, and/or Mont. Code Ann. Sec. 87-3-125 prohibiting use of a motor-driven vehicle where a landowner has not granted permission for such use. The value of he game animal, pursuant to Mont. Code Ann. Sec. 87-1-111 and/or Mont. Code Ann. Sec. 87-1-115, exceeds $1,000; and Count 4: Outfitting Without a License, a misdemeanor, as specified in Mont. Code Ann. Sec. 87-3-116: On or about and between August 25 and September 18, 2008, the Defendant purposely or knowingly, for consideration, provided J.G. personal

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services for him to hunt, kill, and pursue a bighorn sheep. The Defendant located a bighorn sheep prior to J.G. being present in the hunting district and then accompanied J.G. on an expedition for these purposes. The Defendant did not have the required license to act as an outfitter or provide such services. (See, Exhibit 2).

Lewton was arraigned on November 3, 2009, and entered not guilty pleas to all 4 Counts of the Information. On December 15, 2009, the Court held an omnibus hearing and set this matter for a jury trial to be held on May 3, 2010.

On or about August 20, 2008, Lewton was charged by the Blaine County Attorney office in State of Montana v. John Lewton, Blaine County Justice Court Cause No. FG-2009-4802, with Count 1: Criminal Trespass to Property, a misdemeanor, in violation of MCA 45-6-203, to wit: On September 17, 2008, said Defendant entered and drove ATV through posted private property ("Absolutely No Trespassing")("Do Not Enter") Charles Tordick property; and Count 2: Criminal Trespass to Property, a misdemeanor, in violation of MCA 45-6-203, to wit: On September 18, said Defendant entered and drove ATV through posted private property ("Absolutely No Trespassing")("Do Not Enter") Charles Tordick property. See, Notices to Appear and Complaints attached hereto as Exhibits 8 and

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9. Lewton entered pleas of not guilty to both of these charges. A jury trial in this matter is currently scheduled for August 17, 2010.

On August 25, 2009, Lewton was charged by Information by the Montana Attorney General's office in State of Montana v. John E. Lewton, Jefferson County District Court Cause No. DC-09-26 with Count 1: Unlawful Sale of Game Animal, a felony, as specified in Mont. Code Ann. Sec. 87-3-118: On or about October 7, 2008, the Defendant purposely or knowingly purchased all or part of an unlawfully-killed or taken game animal, to-wit: a bighorn sheep. The animal was killed in violation of Mont. Code Ann. Sec. 87-1-125 (Montana Fish, Wildlife and Parks Commission regulations prohibiting two-way communication while hunting and/or prohibiting the use of motor vehicle off legal routes on public land), Mont. Code Ann. Sec. 87-3-304 prohibiting hunting on private land without landowner permission, and/or Mont. Code Ann. Sec. 87-3-125 prohibiting use of a motor-driven vehicle where a landowner has not granted permission for such use. The value of the game animal, pursuant to Mont. Code Ann. Sec. 87-1-111 and/or -115, exceeds $1,000. (See, Exhibit 3).

On September 9, 2009, Lewton was arraigned in Jefferson County District Court and plead not guilty to Count 1 of the Information unlawful sale of game animal. On February 10, 2010, the Court held a scheduling conference. Lewton

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requested that the Jefferson County case be stayed until a verdict and final judgment was entered in the Chouteau County District Court case. The Attorney General on behalf of the State of Montana strenuously objected to Lewton's request arguing that the cases were not interdependent and the Jefferson County case could proceed. The Court set a motions deadline of March 1, 2010, and a jury trial date of July 7, 2010. See, Minute Entry or Notice of Hearing, attached hereto as Exhibit 8. On March 3, 2010, the Court held another scheduling conference. Lewton filed a waiver of speedy trial by facsimile and he also filed a motion to stay the Jefferson County case until the Chouteau County District trial in May of 2010 was completed. The Attorney General again opposed any stay of the Jefferson County proceedings arguing that the matters were independent.

The Court ordered that Lewton file an original waiver of speedy trial by March 8, 2010. In the event that Lewton failed to file the waiver the Court ordered that trial be set for March 17, 2010. See, Minute Entry or Notice of Ruling, attached hereto as Exhibit 10. On March 9, 2010, the Court entered its Order Setting Trial for March 17, 2010. See, Order Setting Trial, attached hereto as Exhibit 11.

On March 17, 2010, the Jefferson County District Court case Cause No. DC-2009-26 proceeded to a 5 day jury trial. The jury was instructed by the Court that in order to prove that the bighorn sheep was unlawfully killed, captured or taken,

the evidence must show beyond a reasonable doubt that Lewton committed any one of the following acts, but all jurors must agree that Defendant committed the same act or acts:

1. That on or about September 17, 2008, the Defendant, purposely or knowingly hunted on the private property of Catherine Brewer, located in Chouteau County, Montana, without prior permission of the landowner.

2. That on or about September 18, 2008, the Defendant, purposely or knowingly hunted on the private property of Catherine Brewer, located in Chouteau County, Montana, without prior permission of the landowner.

3. That on or about September 17, 2008, the Defendant, purposely or knowingly hunted on the private property of William Brown, located in Chouteau County, Montana, without prior permission of the landowner.

4. That on or about September 17, 2008, the Defendant, purposely or knowingly operated a motorized-driven vehicle while hunting off of a legal route on public land located in Chouteau County, Montana.

5. That on or about September 18, 2008, the Defendant, purposely or knowingly operated a motorized-driven vehicle while hunting off of a legal route on public land located in Chouteau County, Montana.

6. That on or about September 17, 2008, the Defendant, purposely or knowingly operated a motorized-driven vehicle while on the private property of George Laulo, located in Chouteau County, Montana, without the landowner's permission.

7. That on or about September 18, 2008, the Defendant, purposely or knowingly operated a motorized-driven vehicle while hunting on the private property of George Laulo, located in Chouteau County, Montana, without the landowner's permission.

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8. That on or about September 17, 2008, the Defendant, purposely or knowingly operated a motorized-driven vehicle while hunting on the private property of Catherine Brewer, located in Chouteau County, Montana, without the landowner's permission.

9. That on or about September 18, 2008, the Defendant, purposely or knowingly operated a motorized-driven vehicle while hunting on the private property of Catherin Brewer, located in Chouteau County, Montana, without the landowner's permission.

10. That on or about September 17, 2008, the Defendant, purposely or knowingly used two-way communication to hunt a game animal in Chouteau County, Montana.

11. That on or about September 18, 2008, the Defendant, purposely or knowingly used two-way communication to hunt a game animal in Chouteau, Montana.

See, Jury Instructions, attached hereto as Exhibit 12.

Lewton did not contest the fact that he purchased the head and horns of the bighorn sheep from Gibson for $5,000.00 and an agreement to "cast" a set of the horns for Gibson. Lewton also did not contest the fact that he purchased the head and horns purposely or knowingly. Lewton however did contest the allegation that the bighorn sheep was illegally taken/killed by Gibson.

On March 24, 2010, the Jefferson County jury found Lewton not guilty of unlawful sale of a game animal. See, Verdict, attached hereto as Exhibit 13.

On April 14, 2010, Lewton filed his motion to dismiss the pending Chouteau County prosecution on the grounds that it violated his Constitutional and statutory

right to be free from double jeopardy from offenses arising out of the same transaction. The district court heard oral argument on Lewton's motion on May 4, 2010, and entered its Order Denying Motion, on June 3, 2010.

1. **The Continued Prosecution of Lewton in this Matter Violates his Rights Under the Fifth Amendment to the United States Constitution and Art. II, Sec. 25 of the Montana Constitution Prohibiting a Defendant from Being Placed in Double Jeopardy.**

The Double Jeopardy clause of the Fifth Amendment to the United States Constitution, and Art. II, Sec. 25, of the Montana Constitution protects citizens from being placed in jeopardy twice for the same offense. Lewton has been charged in Count 3 of the Information in the Chouteau County prosecution with having violated MCA 87-3-111. Unlawful possession, shipping or transportation of game fish, birds, game animals, or fur-bearing animals. (1) It is unlawful for a person to possess, ship, or transport all or part of any game fish, bird, game animal, or fur bearing animal that was unlawfully killed, captured, or taken, whether killed, captured or taken in Montana or outside of Montana. (2) This section does not prohibit: (a) the possession, shipping, or transportation of hides, heads, or mounts of lawfully killed, captured, or taken game fish, birds, game animals, or fur-bearing animals[.]

Lewton was charged in the Jefferson County case of having violated MCA 87-3-118. Unlawful sale of game fish, birds, game animals, or fur-bearing animals. (1) A person commits the offense of unlawful sale of a game fish, bird, game animal, or fur bearing animal if the person purposely or knowingly sells, purchases, or exchanges all of part of any game fish, bird, game animal, or fur-bearing animal. (3) This section does not prohibit: (a) the sale, purchase, or exchange of hides, heads, or mounts of game fish, birds, game animals that have been lawfully killed, captured or taken [.] Lewton was acquitted of this offense on March 24, 2010.

Both Count 3 of the Chouteau County prosecution and Count 1 of the Jefferson County case involved the "lawfulness" of the game animal in question killed or taken.

MCA 87-3-117, provides as follows: Definitions of lawfully killed, captured, or taken and unlawfully killed, captured or taken. As used in 87-3-111 and 87-3-118, and this section, the following definitions apply: (1) "Lawfully killed, captured, or taken" means killed, captured, or taken in conformance with this title, the regulations adopted by the commission, and the rules adopted by the department under authority of this title. (2) "Unlawfully killed, captured, or taken" means not lawfully killed, captured, or taken. MCA 87-3-117.

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The allegations or facts contained in Count 3 of the Information in the Chouteau County prosecution are as follows: Count 3: Unlawful Possession of Game Animal, a felony, as specified in Mont. Code Ann. Sec. 87-3-111: On or about September 18, 2008, the Defendant purposely or knowingly, possessed or transported all or part of an unlawfully killed or taken game animal, to-wit: a bighorn sheep. The animal was killed and/or transported in violation of Mont. Code Ann. Sec. 87-1-125:

1. Montana Fish, Wildlife and Parks Commission regulations prohibiting two-way communication while hunting;
2. and/or prohibiting the use of motor vehicle off legal routes on public land;
3. Mont. Code Ann. Sec. 87-3-304, prohibiting hunting on private land without landowner permission;
4. and/or Mont. Code Ann. Sec. 87-3-125, prohibiting use of a motor-driven vehicle where a landowner has not granted permission for such use;
5. the value of the game animal, pursuant to Mont. Code Ann. Sec. 87-1-111 and/or Mont. Code Ann. Sec. 87-1-115, exceeds $1,000.

See, Exhibit 2.

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The allegations or facts contained in Count 1 of the Information in the Jefferson County case are as follows: Count I: Unlawful Sale of Game Animal, a felony, as specified in Mont. Code Ann. Sec. 87-3-118: On or about October 7, 2008, the Defendant purposely or knowingly purchased all or part of an unlawfully killed or taken game animal, to-wit: a bighorn sheep. The animal was killed in violation of Mont. Code Ann. Sec. 87-1-125:

1. Montana Fish, Wildlife and Parks Commission regulations prohibiting two-way communication while hunting;
2. and/or prohibiting the use of motor vehicle off legal routes on public land;
3. Mont. Code Ann. Sec. 87-3-304 prohibiting hunting on private land without landowner permission,
4. and/or Mont. Code Ann. Sec. 87-3-125 prohibiting use of a motor-driven vehicle where a landowner has not granted permission for such use;
5. the value of the game animal, pursuant to Mont. Code Ann. Sec. 87-1-111 and/or Mont. Code Ann. Sec. 87-1-115, exceeds $1,000.

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See, Exhibit 3.

As this Court can see the State charged the exact same facts and elements verbatim in both of the Informations, because the underlying transaction was supported by the same facts in question: the lawfullness or unlawfulness of the killing or taking of the game animal in question.

The Jefferson County jury was instructed by the district court very specifically on the applicable law regarding the elements of the offense, which were taken verbatim from the State's charging document, and considered them in its deliberation. Due process protections require that convictions be predicated on "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [a defendant] is charged." In re Winship, 397 U.S. 358, 364, 90 S.C. 1068, 1073, 25 L.Ed.2d 368 (1970). The State failed in its burden to prove even 1 of the 11 predicate acts that the jury was instructed on that would have made the bighorn sheep unlawfully killed, captured, or taken. (See, Exhibit 12, Jury Instruction No. 21). It is disingenuous at best for the State to even suggest that Lewton somehow manipulated the elements of the offense in the instructions given to the Jefferson County jury. "To rely on the instructions as offered and secured by one party, in light of an acquittal, would allow manipulation of the elements of a crime as basis for relief, even though there is not evidence that the Jefferson

County jury used the jury instruction as a guide to the Defendant's exposure." State's Response to Motion at page 5. If the elements of the "unlawfulness" of the game animal in question, don't constitute the elements offered by the State in both the Chouteau County prosecution and the Jefferson County case then what does?

The elements or facts were taken directly from the State's Information and the Supporting Affidavit. The jury instructions given by the Court in Jefferson County are the law of the case and the State cannot now argue to this Court that the jury instructions given by Judge Tucker "do not accurately state the law applicable in either the Jefferson County case or the Chouteau County case. Such instructions cannot and should not be a basis for determining the issue raised by the Defendant, as they are a statement of the Defendant's position in the case rather than any indication of the exposure caused by the charge." Id. Again, these were the instructions that Judge Tucker determined applied to the elements of the offense that was alleged by the State in its Information and Supporting Affidavit.

The Montana Supreme Court has consistently held that it cannot be presumed that a jury ignored its duty to respect the instructions of a court. State v. White, 2008 MT 129, ¶ 13; State v. Dubois, 2006 MT 89, ¶ 60; Malcolm v. Evenflo Co., 2009 MT 285, ¶103, 352 Mont. 325, 217 P.3d 514.

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The Double Jeopardy clause of the Fifth Amendment to the United States Constitution, and Art. II, Sec. 25, of the Montana Constitution protects citizens from being placed twice in jeopardy for the same offense. Jeopardy attaches once a jury is sworn and impaneled. State v. Carney, 219 Mont. 412, 417, 714 P.2d 532, 535 (1986). As the United States Supreme Court has explained:

> [u]nderlying this constitutional safeguard is the belief that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty"

United States v. Dinitz, 424 U.S. 600, 606, 96 S.Ct. 1075, 1079, 47 L.Ed.2d 267 (1976) (quoting Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct 221, 223, 2L.Ed.2d 199 (1957)).

The facts and elements of Count 1 and Count 2, in the Chouteau County prosecution allege that Lewton hunted without landowner permission, a misdemeanor, in violation of MCA 87-3-304, on September 17 and 18, 2008, on the private property of George Laulo, Catherine Brewer, and/or William Brown, were also instructed on by Judge Tucker to the Jefferson County jury. (See, Exhibit. 12, Jury Instruction No. 21)

In State v. Guillaume, 1999 MT 29, ¶ 8, 293 Mont. 224, ¶ 8, 975 P.2d 312, ¶ 8, the Montana Supreme Court held that Article II, Section 25 of the Montana

Constitution offers protection against "multiple prosecutions for offenses arising out of the same transaction."

All of the offenses charged against Lewton alleged to have been committed in all of the various counties arose out of the same transaction. The Double Jeopardy clause of the Fifth Amendment to the United States Constitution, and Art. II, Sec. 25 of the Montana Constitution protects citizens from being placed in twice in jeopardy for the same offense. The Constitutional double jeopardy protections prevent Lewton from having to defend against the same predicate offenses again and again. State v. Williams, 2010 MT 58. The transactions are not distinct they contain overlapping and underlying facts and elements, which are contained in both of the charging documents in both Chouteau and Jefferson Counties. State v. Sword, 229 Mont. 370, 7474 P.2d 206 (Mont. 1987).

2. The Continued Prosecution of Lewton in this Matter Violates MCA 46-11-503.

The State's continued prosecution of Lewton in the Chouteau County matter is barred by MCA 46-11-503. The grant or denial of a motion to dismiss in a criminal case is a question of law which is reviewed *de novo* on appeal. State v. Beanblossom, 2002 MT 351, ¶ 9, 313 Mont. 394, ¶ 9, 61 P.3d 165, ¶ 9.

MCA 46-3-110(1), provides that in all criminal prosecutions, the charge must be filed in the county where the offense was committed unless otherwise provided

by law. MCA 46-3-112, further provides that (1) except as provided in 46-3-110(2), if two or more acts are requisite to the commission of an offense or if two or more acts are committed in furtherance of a common scheme, the charge may be filed an any county in which any of the acts or offenses occurred; and (2) except as provided in 46-3-110(2), if an act requisite to the commission of an offense occurs or continues in more than one county, the charge may be filed in any county in which the act occurred or continued.

Gibson first met with Lewton in Jefferson County on July 29, 2008, to investigate him for illegal outfitting. They discussed hunting bighorns and what it would cost for Lewton to scout hunting district 680 from the air for Gibson. Gibson again met with Lewton in Jefferson County on August 27, 2008, and gave Lewton a check for $1,000.00 for airplane scouting of bighorn sheep in hunting district 680 which encompasses both Chouteau County and Blaine County. In the first part of September 2008, Lewton flew over hunting district 680 scouting for a trophy bighorn sheep for Gibson to hunt and kill. Gibson next met Lewton on the south side of the Missouri River at Stafford Ferry in Fergus County on September 17, 2008, where the hunting expedition began. The hunting party then crossed to the north side of the Missouri River and into Blaine County and drove to an area in hunting district 680 and unloaded their ATVs and then drove their ATVs south

along a road that crossed the private property of Charles Tordick in Blaine County. The hunting party then crossed into Chouteau County on their ATVs and parked on BLM property. Over the course of the next day and a half the hunting party hunted without permission on the private property of George Laulo, Catherine Brewer and William Brown all located in Chouteau County. The hunting party allegedly used two-way communication to hunt the bighorn ram that was subsequently located and shot and unlawfully killed/taken by Gibson. Lewton allegedly possessed and helped Gibson transport the unlawfully killed/taken ram while in still in Chouteau County.

Gibson then transported the unlawfully killed/taken ram to Lewton's shop in Jefferson County on October 7, 2008, where he sold it to Lewton for $5,000.00 and a cast of the horns. Title of the unlawfully killed/taken ram then passed to Lewton in Jefferson County.

Pursuant to MCA 46-3-110(1) and MCA 46-3-112(1) and (2), the Attorney General could have filed all of the charges against Lewton in this matter in at least one of four counties: Jefferson, Fergus, Chouteau or Blaine. However, after almost a year long investigation it chose to file 4 counts in Chouteau County District Court, 2 counts in Blaine County Justice Court and 1 count in Jefferson County District Court.

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MCA 46-11-503, provides in pertinent part:

> (1) When two or more offenses are known to the prosecutor, are supported by probable cause, and are consummated prior to the original charge and jurisdiction and venue of the offenses lie in a single court, a prosecution is barred if:
>
> (a) the former prosecution resulted in an acquittal. There is an acquittal whenever the prosecution results in a finding of not guilty by the trier of fact[.]

The record is clear that the Attorney General knew of all the offenses, and that they were supported by probable cause, and were all consummated by or on October 7, 2008, prior to the original charge that was filed in Chouteau County on August 24, 2009. Finally, Lewton was acquitted of the unlawful sale of game animal charge in Jefferson County District Court on March 24, 2010.

The only remaining criterion expressly set forth in MCA 46-11-503(1)(a), is that jurisdiction and venue of all the offenses must lie in a single court. As stated above the criminal conduct of Lewton commenced on July 29, 2008, in Jefferson County and was continued and consummated in Fergus County, Blaine County, Chouteau County and finally in Jefferson County on October 7, 2008.

Accordingly, all of the criteria to bar the further prosecution of Lewton under MCA 46-11-503(1)(a) in Chouteau County have been met and this Court should dismiss that matter with prejudice.

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3. The Continued Prosecution of Lewton Violates MCA 46-11-504.

The continued prosecution of Lewton violates MCA 46-11-504. The interpretation and application of Montana's statutory double jeopardy protections is a question of law that the Montana Supreme Court reviews for correctness. See, State v. Cech, 2007 MT 184, ¶ 7, 338 Mont. 330, 167 P.3d 389. The Montana Supreme Court uses a three part test to determine whether a subsequent prosecution is barred under MCA 46-11-504(1), as follows:

> (1) a defendant's conduct constitutes an offense within the jurisdiction of the court where the first prosecution occurred and within the jurisdiction of the court where the subsequent prosecution if pursued;
>
> (2) the first prosecution resulted in an acquittal or a conviction; and
>
> (3) the subsequent prosecution is based on an offense arising out of the same transaction [as that term is defined in MCA 46-1-202(23).

Cech, ¶ 13 (quoting State v. Tadewaldt, 277 Mont. 261, 264, 922 P.2d 463, 465 (1996)). All three factors must be met in order to bar subsequent prosecution. State v. Gazda, 2003 MT 350, ¶ 12, 318 Mont. 516, 82 P.3d 20.

In the Chouteau County prosecution the three factors of the test announced in Tadewalt have been met. The first factor of the test is satisfied when both jurisdictions have authority to prosecute for the same conduct. State v. Sword, 229 Mont. 370, 373, 747 P.2d 206, 208 (1987). In order to demonstrate jurisdiction

existed in both courts, the same conduct must subject a defendant to the possibility that he could be convicted of an "equivalent" offense in each jurisdiction. Cech, ¶ 17 (citing Gazda, ¶ 14). It is not necessary that a defendant be charged with identical offenses in both jurisdictions, only that his conduct constitute an equivalent offense in both jurisdictions. Cech, ¶ 18.

Although, Lewton was not charged with identical offense in Jefferson County and Chouteau County, the Attorney General is seeking to punish him for the same conduct he has already been acquitted for. In this instance, while the elements of the charges brought in Jefferson County and the Chouteau County case are not identical, under the facts of the cases the offenses of hunting without land owner permission and unlawful possession of a game animal, and unlawful sale of a game animal are equivalent. Factor one of the test announced in Tadewalt, is satisfied. The first prosecution in Jefferson County resulted in an acquittal which satisfies factor two.

For the purposes of factor three of the double jeopardy test announced in Tadewalt, the offenses charged in different jurisdictions must arise out of the same transaction.

MCA 46-11-410 prohibits a defendant from being convicted of more than one offense arising out of the same transaction if "one offense arising out of the same transaction is included in the other." "Included offense" means an offense that:

> (a) is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
>
> (b) consists of an attempt to commit the offense charged or to commit an offense otherwise included in the offense charged; or
>
> (c) differs from the offense charged only in the respect that a less serious injury or risk to the same person, property, or public interest or a lessor kind of culpability suffices to establish its commission.
>
> (d) the offenses differ only in that one is defined to prohibit a specific instance of the conduct; or
>
> (e) the offense is defined to prohibit a continuing course of conduct and the defendant's course of conduct was interrupted, unless the law provides that the specific instance of conduct constitute separate offenses.

MCA 46-11-410.

"Facts," as used in subsection (a) refers to the general statutory elements, rather than the individual facts of the particular case. State v. Beavers, 1999 MT 260, ¶30, 296 Mont. 340, 987 P.2d 371. MCA 46-1-202(23) defines "same transaction" as

> Conduct consisting of a series of acts or omissions that are motivated by:

(a) a purpose to accomplish a criminal objective and that are necessary or incidental to the accomplishment of that objective; or

(b) a common purpose or plan that results in the repeated commission of the same offense or effect upon the same person or the property of the same person.

See, also, Cech, ¶¶ 19-22; State ex rel. Booth v.Mont. Twenty-First Jud. Dist., 1998 MT 344, ¶¶ 21-24, 292 Mont. 371, 972 P.2d 325.

The offense of unlawful sale of a game animal is proven where a person "purposely or knowingly sold, purchased, or exchanged all or part of a game animal that was unlawfully, killed, captured, or taken" MCA 87-3-118. The information filed by the State in the Jefferson County case alleged that Lewton purchased an unlawfully killed or taken game animal. The conduct or transaction that allegedly made the game animal unlawfully killed or taken occurred in Chouteau County. Both the Chouteau County Information and the Jefferson County Information reference the same time frame and the same conduct involving the same bighorn sheep. While the Chouteau County prosecution focuses on unlawful possession or transporting an unlawfully killed /taken game animal, it is premised on illegal radio use while hunting, hunting without landowner permission, illegal off roading and illegal guiding. Both the Chouteau County prosecution and the Jefferson County case included, as a part of the offense, the same premise of an unlawfully killed /taken game animal.

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Lewton was charged with equivalent offenses in both jurisdictions based upon engaging in hunting and then purchasing the same bighorn sheep at issue. The crimes Lewton were charged with are different, but the same conduct led to equivalent charges. Offenses arise from the same transaction when a defendant's underlying conduct which gives rise to each prosecution is motivated by a purpose to accomplish the same criminal objective. Gazda,¶ 20. In this case Lewton's criminal objective was to engage Gibson into hunting and killing and then buying the bighorn ram. His conduct in both Chouteau County and Jefferson County constitute crimes that could have been prosecuted in either county. Accordingly, the Court should bar the State from continuing its prosecution of Lewton in Chouteau County and dismiss those charges with prejudice.

4. The State of Montana Argued in the Jefferson County Case that the "Underlying Illegalities" that Were Alleged to Have Been Committed by Lewton in Chouteau County Were All Part of the Same Transaction.

Lewton filed a motion in limine in the Jefferson County case arguing that the State should not be allowed to offer evidence of "other crimes, wrongs, or acts" pursuant rule 404, M.R.Evid., and MCA 46-13-109, against Lewton, that were contained in the pending charges against him Chouteau County District Court.

Regarding Lewton's motion in limine filed in the Jefferson County Case, the Court inquired of the Attorney General about "Just evidence", or "modified Just", or other "bad acts" regarding the charges in Chouteau County. See, Trial transcript pages 247 through 265, specifically page 247, line 20. The Attorney General responded:

Your Honor, I notice in the pleading that there is an assertion that there **is certain things that are not part of the transaction, and they clearly are**. . . .**But there is a transaction here that includes things that happened in another county, and yes, it involves charges in another county**. That's not unusual. Somebody can be charged in these types of cases where there are underlying illegalities with regard to the death of an animal, **there are other activities that then can pull those in as part of the transaction. So yes they are inextricably related to the case**. They are not other acts. We do not intend to present other acts, but we do intend to present everything that is charged in the case. (emphasis added) Id. at page 248, line 4.

The Court then asked the Attorney General what those "items" would be. Id. at page 248, line 23. The Attorney General responded:

"Actually the hunt; the things that establish the illegalities with regard to the taking of this animal; the fact that it was unlawfully taken; this man knew it was, and turned around and sold it. **It was all part of the same transaction**." (emphasis added) Id. at page 248, line 25 through page 249, line 5.

In making its ruling on the admissibility of the underlying bad acts or the alleged "illegalities" that made the bighorn sheep unlawfully taken, the Court held that "[b]y virtue of the fact that the State must prove an underlying illegality, the

connection is perfectly clear, so it seems to me that the evidence could be received under the transaction rule." Id. at page 262, line 23 through page 263, line 2. The State was allowed to introduce the underlying acts that it alleged were committed in Chouteau County that had made the bighorn ram illegally taken. The Court instructed the jury that they must consider the underlying illegalities that were alleged to have been committed by Lewton in Chouteau County. (See, Exhibit 12, Jury Instruction No. 21).

Judicial estoppel binds the State to its judicial admissions and prevents the State from taking a position "inconsistent with previously made declarations in a subsequent action or proceeding." Kauffman-Harmon v. Kauffman, 2001 MT 238, ¶ 15, 307 Mont. 45, ¶ 15, 36 P.3d 408, ¶ 15. The State cannot argue now that the Chouteau County offenses were not part of the same transaction that the Lewton was acquitted of in the Jefferson County case. The State's argument is inconsistent with its successful argument it made to the Jefferson County Court which resulted in the Court ruling that the underlying illegalities that were alleged to have been committed in Chouteau County regarding the unlawfulness of the bighorn sheep were all part of the same transaction and that evidence and those facts were admissible in that case. The State cannot have it both ways.

Based upon the record in the Jefferson County case, and the Double Jeopardy clause of the Fifth Amendment to the United States Constitution, and Art. II, Sec. 25 of the Montana Constitution and MCA 46-11-503, and MCA 46-11-504(1), State is barred from its continued prosecution of Lewton in Chouteau County because the "subsequent" Chouteau County prosecution is based on offenses arising out of the same transaction as argued by the State to the Jefferson County Court.

C. STANDARD FOR SUPERVISORY CONTROL.

> In matters involving supervisory control, this Court has followed the practice of proceeding on a case-by-case basis though we are careful not to substitute the power of supervisory control for an appeal. *State ex rel. Reid v. District Court* (1953), 126 Mont. 489, 255 P.2d 693. Justice and judicial economy is served when, **faced with a record that shows the relator is deprived of a fundamental right**, we resolve the issue in favor of the relator and assume jurisdiction. *State ex rel. Coburg v. Bennett* (1982), 202 Mont. 20, 655 P.2d 502.

Plumb v. Fourth Judicial Dist. Court, 279 Mont. 363, 370 (Mont. 1996); emphasis supplied.

This Court further stated:

> Judicial economy and inevitable procedural entanglements were cited as appropriate reasons for this Court to issue a writ of supervisory control. *Plumb*, 279 Mont. at 370, 927 P.2d at 1015-16. We noted that, if the district court proceeded based upon a mistake of law, the course of discovery, **the cost of preparation, and the trial itself** would be adversely affected. *Plumb*, 279 Mont. at 370, 927 P.2d at 1015-16. Moreover, settlement negotiations would be hindered, any verdict reached would be questionable, and subsequent litigation and additional costs were inevitable. ...

Truman v. Mont. Eleventh Judicial Dist. Court, 2003 MT 91, ¶15 (emphasis added).

This Court has also held that "... a writ of supervisory control will issue in those circumstances in which the facts show that a party has no plain, speedy or adequate remedy at law, in which there is no right of appeal from a District Court's order, or in which the District Court has so abused its discretions as to justify intervention by this Court." *State ex rel. J. v. District Court,* 179 Mont. 32, 34 (1978).

D. Supervisory control is necessary because the district court has denied Lewton to be free from double jeopardy and he has no adequate remedy by way of appeal.

1. Supervisory control is imperative to restore fundamental rights.

The record clearly shows that Lewton is being deprived of his fundamental right to be free of the harm of double jeopardy or two trials. Such events in themselves warrant supervisory control; clear error of law has occurred resulting in gross injustice. *Truman, supra;* ¶15. This Court must assume jurisdiction and reverse the district court's conclusion that Lewton is not being subjected to double jeopardy. Lewton's only alternative, is to proceed to trial and then appeal if convicted which is not a speedy or adequate remedy to avoid the harm of a trial.

Judicial economy and inevitable procedural entanglements are compelling reasons for the Writ to issue, as well. *Truman, supra,* ¶ 15. Lewton is in the untenable position of proceeding to trial under the district court's fundamental error of law.

This Court's Emergency Writ is necessary to provide Lewton with a plain, speedy, adequate remedy for the district court's erroneous and unsupported ruling denying Lewton's motion to dismiss.

2. Lewton has no option but to seek this Court's emergency direction to the lower court since the Chouteau County case is set for trial June 28, 2010.

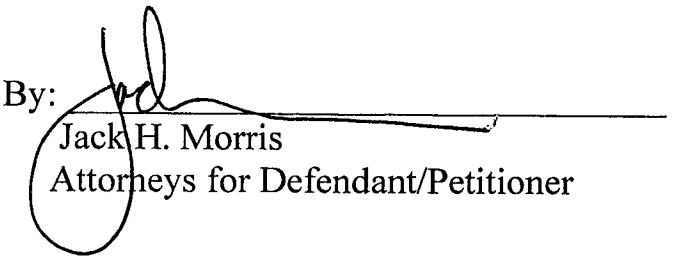
This Court's immediate assumption of jurisdiction for the purpose of staying the June 28, 2010 trial and overruling the districts court's error of law in denying Lewton's motion to dismiss is essential to restore his fundamental right to be free from the harm of double jeopardy. There exists no other plain, speedy, or adequate remedy at law.

IV. CONCLUSION

Lewton respectfully requests this Court's issuance of a Writ of Supervisory Control, on an emergency basis, directing the district court to vacate the June 28, 2010, jury trial and grant Lewton's motion to dismiss the Chouteau County prosecution with prejudice.

DATED: June 7, 2010.

JARDINE & MORRIS, PLLC

By: 

Jack H. Morris
Attorneys for Defendant/Petitioner

35. **PETITION FOR WRIT OF SUPERVISORY CONTROL.**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PETITION FOR WRIT OF SUPERVISORY CONTROL was served upon the following persons by the following means:

_____ Hand Delivery
_x___ Regular Mail
_____ Overnight Delivery Service
_____ Fax
_____ E- Mail

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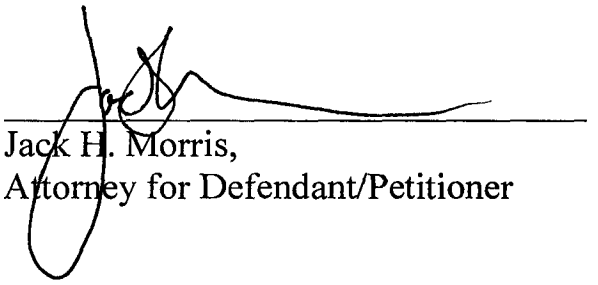
DATED: June 7, 2010.

Jack H. Morris
Attorney for Defendant/Petitioner

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(d) of the Montana Rules of Appellate Procedure, I certify that this Petition is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Word 2003 is 7,998 words, excluding the table of contents, table of authorities, certificate of service and certificate of compliance.



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